

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002734-MR

ROBERT NEAL PETTIT

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 95-CI-174

SUSAN KAY PETTIT

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART
** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF; JUDGES.

JOHNSON, JUDGE: Robert Neal Pettit (Robert) appeals an order of the Rowan Circuit Court entered on September 30, 1997, that granted sole custody of his daughter to his former wife, Susan Kay Pettit (Susan), and required him to pay child support based on imputed income. Robert argues that the trial court considered improper evidence in relation to the custody issue and failed to make required findings related to custody; calculated child support incorrectly; improperly denied him in forma pauperis status; and assessed an excessive domestic relations commissioner's fee. After reviewing the record, the applicable

law, and the arguments of counsel, we affirm in part, reverse in part and remand.

Robert and Susan have one child, Ashley, born in 1987. They divorced in 1993. The final decree dissolving the marriage incorporated the couple's agreement to share joint custody. In the summer of 1995, Susan sought an Emergency Protective Order and a Domestic Violence Order from the Rowan District Court. The district court entered the orders and granted Susan temporary custody of Ashley. Both parties moved the circuit court for sole custody in July 1995. The domestic relations commissioner (commissioner) held a hearing over five days in July and August 1997. The commissioner recommended granting sole custody to Susan. Robert filed objections and requested additional factual findings. The commissioner entered one additional finding and overruled the rest of Robert's objections. By order entered on September 30, 1997, the trial court adopted the commissioner's report in its entirety. This appeal followed.

While this appeal was pending, Robert moved this Court to strike Susan's brief for failure to cite to the record. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iii). See Ventors v. Watts, Ky.App., 686 S.W.2d 833, 834-835 (1985). A motion panel of this Court passed the motion to the merits. We deny the motion. It is true that Susan did not satisfy either the letter or the spirit of the rules. However, it is also true that Robert's references to the record were at times misleading and out of context. These deficiencies by both parties forced us

to review the video record in detail. Since Robert is also at fault, we deny his motion to strike Susan's brief.

In awarding sole custody to Susan, the trial court modified the previous award of joint custody. Neither party questions the grounds for modification. See Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994). The record supports the trial court's decision to decide custody de novo. Id.

Robert first argues that the trial court did not make adequate findings, and that the findings it did make do not support its custody decision. We disagree.

The overriding consideration in any custody determination is the best interest of the child. Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); Kentucky Revised Statutes (KRS) 403.270. In determining the best interest of the child the trial court must consider all relevant factors, including those in KRS 403.270(1), and must find the facts specifically. McFarland v. McFarland, Ky.App., 804 S.W.2d 17, 18 (1991); CR 52.01. Findings of fact made by a domestic relations commissioner and adopted by the trial court shall not be set aside unless clearly erroneous. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). The trial court has broad discretion in deciding custody. Squires, supra, at 770.

The commissioner heard testimony from over a dozen witnesses during five days of hearings. The witnesses included the parties, some friends, co-workers, family of the parties, and some professionals with knowledge of the case. In her report,

the commissioner summarized the testimony of each witness and made recommended factual findings and conclusions of law. We have reviewed the portions of the record relevant to Robert's complaints. Susan testified that in the presence of the child, Robert had been violent towards her and had made disparaging remarks about her. She said this occurred during and after their marriage. There was evidence that the child wanted to live with Susan. The trial court found that awarding Susan sole custody was in the child's best interest.

The trial court's order does not cite all the factors under KRS 403.270, nor does it expressly tie its factual findings to the statutory factors. However, the trial court's summary of the testimony and its factual findings are thorough and supported by the record. The factual findings, in turn, support the custody decision. The factual findings relate to the wishes of the child, the interaction and interrelationship of the child with her parents, and evidence of domestic violence that has affected the child and the child's relationship with both parents. KRS 403.270(1)(b), (c), (f); KRS 403.720 (2). The trial court addressed the factors relevant to this case. We find no clear error in any of the trial court's factual findings and no abuse of discretion in its custody decision. Reichle, supra; Squires, supra.

Robert next argues that the trial court erred by appointing a Court-Appointed Special Advocate (CASA), a caseworker who has volunteered her services to the court. He alleges that the trial court did not have the authority to do so,

that the CASA appointed was not qualified to testify as an expert, and that the trial court abdicated its responsibility by adopting the CASA's recommendations. We disagree with each contention.

District court judges may appoint a CASA to provide representation for children who enter the court system as a result of dependency, abuse, and neglect. KRS 620.505. The role of the CASA is to represent the best interest of the child. KRS 620.505(9). "In contested custody proceedings . . . the Court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the friend of the Court or such other agency as the Court may select." KRS 403.300(1).

The commissioner recommended that the trial court appoint a CASA to supervise visitation because Robert had discussed custody with his daughter in violation of a court order. The CASA, Betty Cutts (Cutts), had fulfilled the training requirements for the CASA program. Cutts supervised visitation, observed Ashley with her parents, interviewed people who knew the parties, and prepared a report. The CASA recommended that Susan get sole custody and suggested terms of visitation. Robert moved to set aside the order appointing a CASA and to strike the CASA's written report. The trial court denied the motions. The trial court decided custody and visitation consistent with the CASA's recommendations.

We find no error. There is no statute specifically providing for or prohibiting the appointment of a CASA in a

custody case. However, we believe this use of a CASA is consistent with KRS 403.300. The CASA project under KRS 620.505 can properly be considered an "agency," and the report that was considered by the trial court is consistent with the statute.

As to the CASA's qualifications, there are no precise standards for qualification of expert witnesses. The trial court has discretion in admitting such testimony. Lack of specialized training goes only to the weight of evidence, not to competency. Washington v. Goodman, Ky.App., 830 S.W.2d 398, 400 (1992). Robert exercised his opportunity to challenge the CASA's credentials. The trial court did not abuse its discretion by admitting into evidence the CASA's report and testimony.

We also hold that the trial court did not abdicate its decision-making responsibility. The trial court merely considered the evidence presented by the CASA. It was within the discretion of the trial court to consider that evidence and to give it the appropriate weight that the trial court determined it deserved. See Chalupa v. Chalupa, Ky.App., 830 S.W.2d 391, 392 (1992). The trial court considered testimony from many witnesses other than the CASA. The other evidence supports the trial court's decision. The fact that the trial court's decision was consistent with the CASA's recommendations did not make that decision improper.

Robert next argues that the trial court erred by considering sealed testimony from the parties' child. He contends he was unfairly denied the right to cross-examine the child about her wishes. We disagree.

The commissioner interviewed Ashley in chambers months before the final custody hearing. She ordered the record of that interview sealed and did not interview her again. The CASA reported and testified about the child's reaction to the custody battle. The CASA said that Ashley wanted to live with her mother but to continue visiting her father. Both parties introduced other testimony about what the child had said. The trial court found that the child "wishes to have a normal relationship with her father, but resents his statements about her mother and his constant attempts to control all aspects of her life." There is nothing in the record to support Robert's assertion that the trial court based this finding on sealed testimony. On the other hand, the trial court's finding is supported by the CASA's report and testimony. Robert had the CASA's report. He had the opportunity to cross-examine the CASA about her observations and conclusions. KRS 403.300(3). Since the commissioner permitted both sides to introduce Ashley's statements, Robert could have presented any comments that Ashley made that favored him. We find no error.

Robert next argues that the trial court erred by permitting Jill Riccardo (Riccardo) to testify as Susan's expert witness. He contends she testified as to the ultimate issue in the case. We disagree. Riccardo is a licensed clinical social worker with a masters degree in social work. Susan hired her to evaluate Susan and the child and to make custody recommendations. Riccardo testified that stability was important to the child.

Because Ashley was living with Susan at the time, Robert views this as ultimate issue testimony.

We find no abuse of discretion in the trial court admitting this evidence. Testimony by experts retained by the parties is admissible if the expert is qualified and her testimony is relevant. "Indeed such testimony is commonplace in child custody actions." Poe v. Poe, Ky. App., 711 S.W.2d 849, 852 (1986). Courts commonly rely on social workers' input in child custody cases. 1 Petrelli, Kentucky Family Law, § 26.19 (2d ed. 1988). This includes views on who should be awarded custody. Robert cross-examined Riccardo about the basis for her opinions. To the extent that Riccardo's testimony may have gone to the ultimate issue of custody, the trial court was capable of evaluating this testimony and giving it the appropriate weight.

Robert next argues that the trial court clearly erred by imputing income to him to set child support. We disagree. The child support guidelines in KRS 403.212 serve as a rebuttable presumption for the amount of child support. The statute permits the trial court to calculate child support based on potential income, if it finds a parent is voluntarily unemployed or underemployed. "A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation." KRS 403.212(2)(d) (as amended effective July 15, 1996).

We review the trial court's determination of child support for abuse of discretion. Pegler v. Pegler, Ky.App., 895 S.W.2d 580, 582 (1995). Robert has a college degree, credit

hours towards a masters degree, and an expired teacher's certification. He worked in financial planning and life insurance after college, and worked at the Eastern Kentucky Correctional Complex from 1991 until 1995. In 1995, he quit his job to attend school for a nursing degree. Robert testified that he had been unable to find other employment. His only income at the time of the hearing was from the Army Reserve at \$179 per month. The trial court found that Robert was voluntarily unemployed. It imputed income to him based upon his salary in his last full time job of \$2,064.15 per month.

Citing McKinney v. McKinney, Ky.App., 813 S.W.2d 828 (1991), Robert asserts that for the trial court to impute income it was required to find bad faith on his part. However, KRS 403.212(d) does not have a bad faith requirement. 16 Graham & Keller, Kentucky Practice, § 24.27 (2d ed. 1997). Robert's choice to quit his job to attend school did not relieve him of his child support obligation. The statute creates a presumption that future income will be on a par with the worker's most recent experience. Keplinger v. Keplinger, Ky.App., 839 S.W.2d 566, 569 (1992). Substantial evidence supports the trial court's conclusion that Robert is voluntarily unemployed. Based upon his recent work history and occupational qualifications, the trial court did not abuse its discretion in its calculation of Robert's child support obligation. Pegler, supra.

Robert next argues that the trial court erred in calculating child support because it excluded Susan's employers'

retirement and health insurance contributions from her gross income. We agree with part of his argument.

Gross income for child support purposes includes income from any source. KRS 403.212(2)(b). "Significant in-kind payments or expense reimbursements are also treated as income if they reduce personal living expenses." Graham and Keller, supra, § 24.19. Susan's employer contributes an amount equal to 2 1/2% of her income to her retirement account. This does not reduce Susan's living expenses and was properly excluded.

Susan's employer also provides health insurance of about \$100.00 per month. This does reduce Susan's living expenses and should be treated as income. The child support guidelines require the trial court to subtract the cost of health insurance for the child from the parents' gross income. KRS 403.212(2)(g)(1). The trial court did not adjust either party's gross income in this case. In their separation agreement, the parties agreed to share the cost of health insurance for Ashley. On remand, the trial court is directed to include Susan's employer-provided health insurance as income, less any portion attributable to the health insurance for the child.

Robert next asserts that the trial court erred by denying him in forma pauperis status. We agree. A person who is unable to pay the costs of a legal proceeding without depriving himself or his dependents of the necessities of life may file or defend an action without paying costs. KRS 453.190. To proceed in forma pauperis, the party must file a motion and affidavit. KRS 453.190(3). A party may not proceed in forma pauperis if

there is anyone available who has a legal duty and is willing and able to pay the costs of the action. Tolson v. Lane, Ky., 569 S.W.2d 159, 161 (1978).

Robert filed a motion and affidavit to proceed in forma pauperis in July 1997, with his motion for custody. The trial court denied his motion in its final custody order because it found that Robert was voluntarily unemployed. Voluntary unemployment is not grounds for denying in forma pauperis status. Robert's affidavit meets the statutory requirement. There was evidence that Robert's family was supporting him. However, it appears there is no one with a legal duty to pay the costs of the action. Tolson, supra. Accordingly, the trial court should have granted his motion.

Finally, Robert argues that the trial court assessed an excessive domestic relations commissioner's fee. We agree. Commissioners receive a fee of \$40.00 per hour. They are limited to a total fee of \$600.00 unless a larger fee is "recommended by the circuit judge and approved by the Chief Justice for extraordinary circumstances shown." Administrative Procedures of the Court of Justice, Part IV, Section 4. Here, the trial court assessed a fee of \$1,520.00 based on the 38 hours the commissioner spent on the case. There is no indication that the Chief Justice approved the fee.

We affirm the trial court's award of sole custody to Susan. We reverse and remand the trial court's calculation of child support, its denial of in forma pauperis status to Robert, and its assessment of the domestic relations commissioner's fee.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

BRIEFS FOR APPELLANT:

Hon. Ferrell Adkins
Elizabethtown, KY

BRIEF FOR APPELLEE:

Hon. Jace Nathanson
Morehead, KY